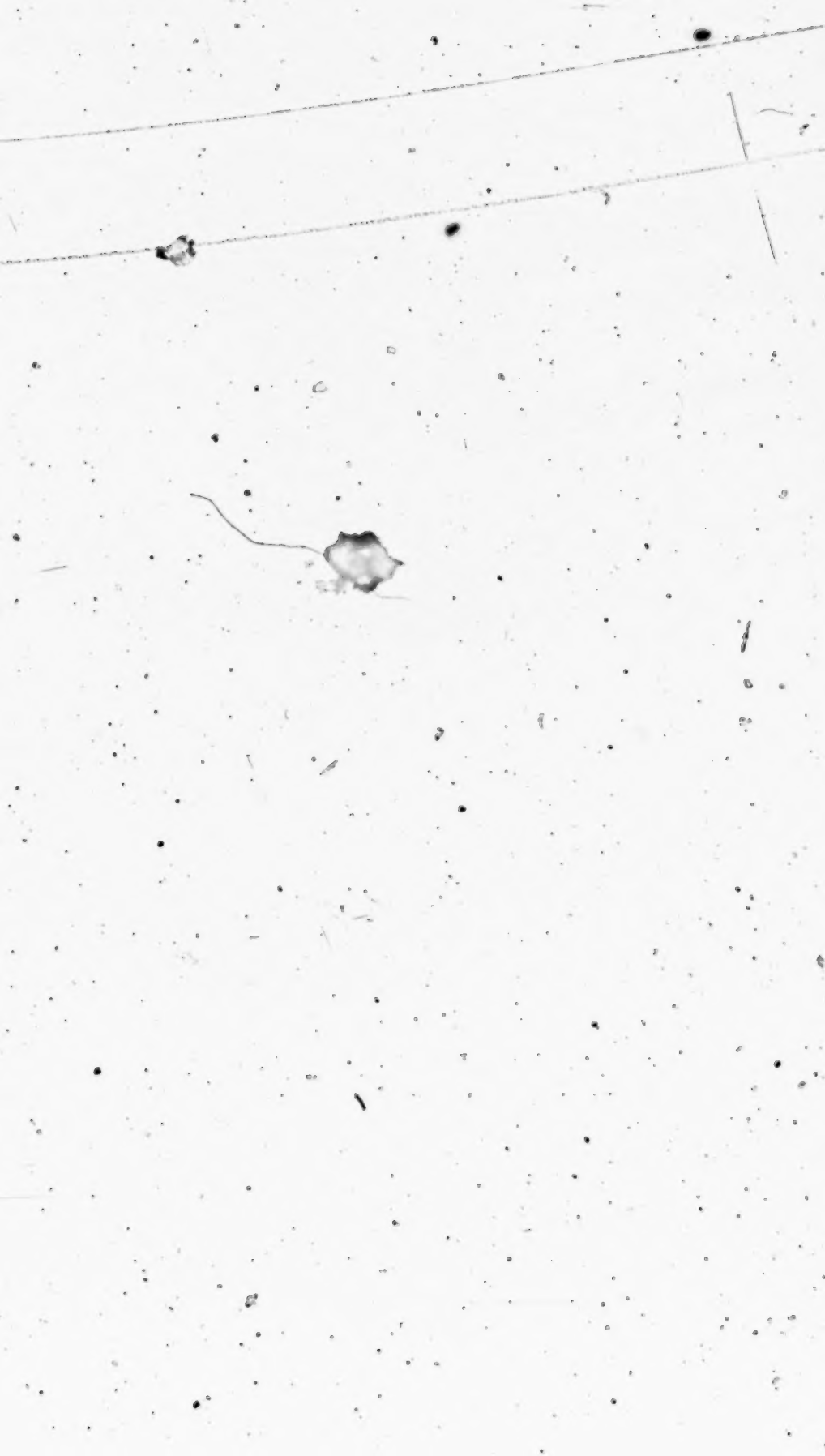

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NO. 66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, ET AL., *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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INDEX

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INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided in Rule 42 of the Rules of this Court.

The present case gives this Court an opportunity to appraise the so-called *Brown-Olds* remedy[1] of the National Labor Relations Board. Typically, this remedy requires the reimbursement of all union dues and fees collected from employees pursuant to a union-security or hiring hall arrangement which the Board determines to be illegal. The

[1] The name comes from *Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594 (1956), the first case in which the Board extended the mass refund remedy to a situation not involving a company-dominated or company-supported union.

practical implications of this new doctrine are staggering. Severe financial hardship, and in some instances financial ruin, is the imminent prospect for many locals affiliated with member unions of the AFL-CIO. Especially affected are unions engaged in the building and construction trades, and other unions operating hiring halls for employees. The AFL-CIO is therefore vitally interested in placing before this Court an outline of the scope of the *Brown-Olds* remedy and its impact on labor unions generally. Not all of the doctrine's ramifications are brought to the fore in this particular case. This is a further reason why the Federation has a special interest in demonstrating to the Court that the formulation and application of this remedy by the National Labor Relations Board, in this case and in many other similar cases for which the decision here might be controlling, is a patent abuse of administrative discretion.

ARGUMENT

The Board's *Brown-Olds* remedy poses two related, but logically distinct, issues: first, the extent of the power possessed by the Board to "support pivotal assumptions" with administrative "expertise alone,"[2] and secondly, the breadth of the discretion lodged with the Board to frame appropriate remedial orders. We submit that the *Brown-Olds* remedy stands condemned when viewed in either light.

The reimbursement remedy is not bottomed on reasonable inferences regarding the facts. It is based on a per se doctrine of inherent coercion, which is unsupported by and indeed contrary to historical and economic data, and which is accompanied by a blithe refusal by the Board even to consider direct evidence contradicting its fallacious assumptions. Furthermore, the remedy itself constitutes an abuse of the Board's discretion to frame appropriate orders. It amounts to a mechanical application of a formula

[2] See *Harrell* v. *FCC*, 267 F. 2d 629, 632 (D. C. Cir. 1959).

that fails to take account of the infinite complexities of situations in the labor-management field. Its operation is oppressive and capricious, causing only slight inconvenience to some unions and financial ruin to others. Finally, the remedy is essentially punitive rather than remedial, being likened even by Board personnel to a "meat-axe" or a "big stick" with which to enforce Board mandates on hiring halls.

I. The Board's Brown-Olds Remedy Is Based On An Unreasonable Inference That All Union Dues And Fees Collected Pursuant To An Illegal Union-Security Or Hiring Hall Arrangement Constitute Coerced Payments.

A. Lack of Reasonable Basis or of Historical or Economic Data to Support Inference of Coercion

We do not contest the existence of the Board's power to draw "reasonable inferences from proven facts." *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 49. We do not contest the Board's right to use its "cumulative experience" in fashioning a remedy, so long as there is exercised due "regard to circumstances which may make its application to a particular situation oppressive * * *." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349. At the same time we consider it beyond cavil that the Board cannot indulge in "mere conjecture" or "extravagant and unwarranted assumption." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 238. Board inferences are to be "reasonable," as this Court stated eight separate times in the course of four pages of its opinion in *Radio Officers*, *supra*, 347 U.S. at 49-52.

The legislative history of the Taft-Hartley Act emphasizes the concern of Congress that the courts should apply a check to any unreasonable inferences on the part of the Board. The role contemplated for reviewing courts under the 1947 amendments to section 10 of the National Labor

Relations Act[3] was spelled out in the following terms in the House Conference Report:

> "• • • they [the courts] will be under a duty to see that the Board observes the provisions of the earlier sections, that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions."[4]

In *Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594 (1956), the Board ordered a union to reimburse all dues and assessments collected under a closed-shop contract. Although the evidence disclosed only one named individual who had been discriminated against, the Board justified its sweeping order covering all employees with the flat assertion: "Dues and assessments here collected constituted the price these employees paid in order to retain their jobs." *Id.* at 601. Primary reliance for this decision was placed on *Virginia Electric and Power Co.* v. *NLRB*, 319 U.S. 533, where this Court approved a Board reimbursement order against a company in 1943.

Virginia Electric was a far different situation. Coloring every other aspect of the case was the fact that it involved a company-dominated union, "a type of organization," as

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[3] Sec. 10(e) of the original National Labor Relations Act, 49 Stat. 454, provided in part: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Sec. 10(f) was similarly worded.

Sec. 10(e) of the National Labor Relations Act, as amended, 61 Stat. 148, 29 U.S.C. § 160(e), provides in part: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." Sec. 10(f) is similarly worded.

[4] H.R. Rep. No. 510, 80th Cong., 1st Sess., p. 56.

expressly noted by this Court, "which Congress has characterized as detrimental to the interests of employees and provocative of industrial unrest." 319 U.S. at 544. The company-dominated union had entered a closed-shop and compulsory check-off arrangement with the company, whereby payments went "into the treasury of the Company's creature to accomplish purposes the Company evidently believed to be to its advantage." *Ibid.* In sum, the company had fashioned this creature, the company had controlled it, the company had dragooned the employees into membership, and the company had exacted tribute to it as the price for the employees' keeping their jobs.

Mr. Justice Frankfurter, concurring in *Virginia Electric*, underscored the need for evidence of coerced payments in order to support the refund order. He distinguished *Western Union Tel. Co.* v. *NLRB*, 113 F. 2d 992 (2d Cir. 1940), where Judge Learned Hand had refused to enforce a reimbursement order even against a company-dominated union, on the ground that in *Western Union* "there was no evidence that all those [employees] who asked to have their wages stopped, did so in any part because they were coerced." 319 U.S. at 545, quoting 113 F. 2d at 997. In *Virginia Electric*, on the other hand, observed Mr. Justice Frankfurter:

> "* * * not only did it [the Company] foster that *company union, it foisted membership in the union upon all its employees.* The Board had a right to find that membership in the union, *which the employees had no power to reject*, equally denied the employees the power to reject the costs of that membership." 319 U.S. at 545. (Emphasis supplied.)

Thus, there were two salient factors in *Virginia Electric* which, taken together with the closed-shop and compulsory check-off arrangement, justified the Board's inference or conclusion that the employee payments were coerced:

1. The union was company-dominated. Congress, as the Court was aware, had recognized the evils of this institution. And labor history was replete with the shortcomings of company unions, with their impotence in times of stress and with their frequent betrayal of their members' interests.[5] It would be wholly reasonable under the circumstances of *Virginia Electric* to infer that the employees would not have associated with such a caricature of a union had they had unfettered choice, and to infer instead that they were forced to pay dues to the organization which had been "foisted" on them.

2. The employees had no readily available means to reject the company-dominated union. Mr. Justice Frankfurter emphasized this fact in his concurrence. *Virginia Electric* was decided in 1943. Not until the Taft-Hartley amendments of 1947 was there a clear-cut method by which employees could secure "decertification" of a collective bargaining representative, or rescission of a collective bargaining representative's authority to make a union-security agreement with their employer.[6]

Neither of these salient factors is present in this case, or in the usual case in which the *Brown-Olds* remedy has been applied.

In none of the cases in which the AFL-CIO is interested, of course, is there a company-dominated union. In *Brown-Olds* itself, and in most of the cases applying the mass reimbursement remedy, including the present one, there has been no question about the legal status of the union as the representative of the majority of the employees on the job.

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[5] Millis and Montgomery, *The Economics of Labor: Organized Labor*, vol. III, pp. 879-886 (1945); Dulles, *Labor in America*, pp. 261, 277 (1949).

[6] See § 9 (c) and (e) of the National Labor Relations Act, as amended, 61 Stat. 144-145, 29 U.S.C. §159 (c), (e); H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 35.

Even in the rare cases involving minority or company-assisted unions,[1] the employees at all times had it within their power, by virtue of the 1947 Taft-Hartley amendment, to revoke their union's authority to make a union-security agreement. These employees, like the employees in other *Brown-Olds* cases, were not lacking in the "power to reject" their union, as were the employees in *Virginia Electric*.

The short of the matter is that only one premise could conceivably support the Board's inference that *all* dues and fees collected pursuant to an illegal union-security or hiring hall arrangement amount to coerced payments even when collected by a free, vigorous union not dominated by any company. That premise, which the Board has never seen fit to articulate, is simply this: No working man would join a labor union and pay dues to it unless he was compelled to do so by a union-security agreement.

To buttress this "extravagant and unwarranted assumption," the Board (so far as we know) has never deigned to cite a single historical study or a single economic survey. Indeed it could not. The whole history of the American labor movement stands ready to refute any such contention.[2] Working men join unions for mutual assistance, for

[1] See, e.g., *Machinists Local 1424 v. NLRB*, 264 F. 2d 575 (D.C. Cir. 1959), *revd. on other grounds* 362 U.S. 411.

[2] On workers' motives for organizing on both a local and national scale, see Commons and Associates, *History of Labor in the United States*, vol. I, pp. 169-184, 575-576 (1918), vol. II, pp. 43-48, 301-306 (1918), vol. IV, pp. 621-630 (1935); Millis and Montgomery, *The Economics of Labor: Organized Labor*, vol. III, pp. 354-359 (1945); Taft, *The A. F. of L. in the Time of Gompers*, pp. 1-13 (1957); Dulles, *Labor in America*, pp. 98-100 (1949). It is simply not the fact that a vague abstraction called a "union" coerces employees into membership, and tries to keep work from nonunion labor. Working men themselves have traditionally banded together and sought to prevent competition from cheap, substandard labor by means of the union shop or some analogous method for protecting their jobs and preserving craft standards. The experience of a

social reasons, and for such financial benefits as group insurance and pensions; but primarily they unite to achieve bargaining parity with their employers. In *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209, Chief Justice Taft succinctly put the matter in perspective:

> "A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer."

Statistical data which the NLRB itself has published illustrate graphically the unreasonableness of the Board's inference of mass coercion. From 1947 to 1951, when the provision was repealed as unnecessary, a proviso to section 8(a)(3) of the National Labor Relations Act required specific authorization by employees before their collective bargaining representatives could enter into union-security agreements. The following is a tabulation of the results of the Board's union-shop authorization polls during this period:[9]

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hundred years attests this. Commons, *supra*, vol. I, pp. 596-600. As late as the 1930s laboring men in many industries had to prove their steadfastness to the principles of organization by running a grim gauntlet of employer goon squads, labor spies, and economic reprisals. See Millis and Montgomery, *supra*, vol. III, pp. 604-612; Rayback, *A History of American Labor*, pp. 343-344 (1959).

[9] See NLRB Thirteenth Annual Report, p. 113 (1948); NLRB Fourteenth Annual Report, p. 172 (1949); NLRB Fifteenth Annual Report, p. 235 (1950); NLRB Sixteenth Annual Report, p. 306 (1951).

Union-Shop Authorization Elections

Fiscal Year	Valid Votes	Votes for Union Shop	% for Union Shop
1947	1,629,330	1,534,980	94.2
1948	1,471,092	1,381,829	93.9
1949	900,866	805,189	89.4
1950	1,335,683	1,164,143	87.2

The inescapable conclusion is that the overwhelming majority of workers voluntarily embrace union conditions. In the light of historical experience and of the Board's own experience with these union-security authorization elections, any other inference, we submit, is patently "unreasonable" within the meaning of *Radio Officers, supra*, 347 U.S. at 48-52. The Board's finding that all employees in *Brown-Olds* cases have been coerced into paying dues is thus not supported by the "substantial evidence on the record considered as a whole" which is required by section 10(e) and (f) of the National Labor Relations Act.

Eight Courts of Appeals have had an opportunity to pass upon the *Brown-Olds* remedy, in cases where the union was not company-dominated or company-assisted but where there were merely alleged to be illegal hiring practices.[10]

[10] A mass reimbursement remedy has been upheld in several cases involving company-assisted or minority unions. See *NLRB* v. *Broderick Wood Products Co.*, 261 F. 2d 548 (10th Cir. 1958); *Dixie Bedding Mfg. Co.* v. *NLRB*, 268 F. 2d 901 (5th Cir. 1959); *O'Neill International Detective Agency, Inc.* v. *NLRB*, 46 LRRM 2503 (3d Cir. June 22, 1960); *Machinists Local 1424* v. *NLRB*, 264 F. 2d 575 (D.C. Cir. 1959), *revd. on other grounds* 362 U.S. 411; *NLRB* v. *Revere Metal Art Co.*, 46 LRRM 2121 (2d Cir. May 6, 1960). But these cases are not authority for imposing a *Brown-Olds* remedy where a majority union, unassisted by a company, is involved. Four of the Courts of Appeals which have enforced mass reimbursement orders in the company-assisted union situation have also had before them a *Brown-Olds* case involving a majority, unassisted union. And in every one of the latter instances, *Brown-Olds* was rejected. See note 11, *infra*, and related text. This is certainly not to say that in all cases of company-assisted unions a

Six Circuits—the Second, the Third, the Fifth, the Eighth, the Ninth, and the District of Columbia—flatly rejected *Brown-Olds* in such instances.[11] The First Circuit has refused to enforce *Brown-Olds* where the NLRB found a hiring arrangement illegal per se,[12] but has granted enforcement where some specific acts of discriminatory hiring were allegedly shown and where extraordinary circumstances militated for enforcement.[13] The Seventh Circuit, in the instant case below, upheld *Brown-Olds* on the theory that once an illegal hiring arrangement was established, "[t]he burden rested on respondents to show that

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mass reimbursement remedy should be applied. A more sophisticated view is that [illegible]e Second Circuit, which even in cases involving company-assisted unions looks to see whether there is actually evidence of coercion of the employees before granting enforcement. Compare *NLRB* v. *Halben Chemical Co.*, 279 F. 2d 189 (2d Cir. 1960) (*Brown-Olds* denied), with *NLRB* v. *Revere Metal Art Co., supra* (*Brown-Olds* enforced).

[11] *Morrison-Knudsen Co.* v. *NLRB*, 275 F. 2d 914 (2d Cir. 1960); *Teamsters Local 282* v. *NLRB*, 275 F. 2d 909 (2d Cir. 1960); *NLRB* v. *American Dredging Co.*, 276 F. 2d 286 (3d Cir. 1960); *NLRB* v. *United States Steel Corp. (American Bridge Division)*, 278 F. 2d 896 (3d Cir. 1960); *NLRB* v. *Sheet Metal Workers Local 85*, 274 F. 2d 344 (5th Cir. 1960); *NLRB* v. *Millwrights Local 2232*, 277 F. 2d 217 (5th Cir. 1960); *NLRB* v. *Operating Engineers Local 382*, 46 LRRM 2544 (8th Cir. June 29, 1960); *Morrison-Knudsen Co.* v. *NLRB*, 276 F. 2d 63 (9th Cir. 1960); *Teamsters Local 357* v. *NLRB*, 275 F. 2d 646 (D.C. Cir. 1960), *cert. granted* 363 U.S. 837.

[12] *NLRB* v. *Carpenters Local 176*, 276 F. 2d 583 (1st Cir. 1960). The court looked on the "disgorgement order" as an "ex post facto penalty" when applied to conduct deemed unlawful only on the basis of the subsequently adopted *Mountain Pacific* doctrine. *Id.* at 586.

[13] *NLRB* v. *Carpenters Local 111*, 278 F. 2d 823 (1st Cir. 1960). This case may be regarded as *sui generis*. The union was not represented by counsel before the Board and had failed to file exceptions to the Trial Examiner's Report. The court concluded: "We think the correct rule is that in case of default an order should be enforced if it is not unreasonable on its face, and has some semblance of support on the findings below." *Id.* at 825.

even without the unlawful discrimination, the Company's employees would have maintained their "membership" in the union.[14] This erroneously assumed that the *Brown-Olds* doctrine involves a rebuttable presumption. In reality, the Board views it as a "conclusive presumption." [15]

Thus, in every one of the six Circuits where *Brown-Olds* has been assayed in its pure form, unalloyed with misconceptions about its scope or with other, extraneous considerations, the Board's doctrine has been rejected. And no Court of Appeals has approved it, absent such misconceptions or other special factors. The latest Circuit to register its position, the Eighth, summed up the tenor of prior decisions as follows:

> "Primarily, a determination of the coercive nature of the payments to the union must be reached upon facts which lend support to a reasonable inference of such coercion. This requires a showing that the receipt of funds was directly related to the unlawful practice. * * * In cases which refused enforcement of the broad remedy, the courts found that there was no direct relation between the illegal act and the collection of fees, or that the evidence in some other way demonstrated lack of coercion, or failed to furnish a basis for a reasonable inference of such coercion." *NLRB* v. *Operating Engineers Local 382*, 46 LRRM 2544, 2548 (8th Cir. June 29, 1960).

B. The Board's Irrebuttable Inference; the Doctrine of Per Se Coercion

The Board has not rested content with drawing the unreasonable inference that all employees in *Brown-Olds* situations have been coerced into paying dues. It has pro-

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[14] *NLRB* v. *Carpenters Local 60*, 273 F. 2d 699, 703 (7th Cir. 1960).

[15] See *NLRB* v. *United States Steel Corp. (American Bridge Division)*, 278 F. 2d 896, 902 (3d Cir. 1960); Part B, *infra*.

ceeded to amplify the doctrine in subsequent decisions, holding that an illegal hiring practice or unlawful union-security provision "inevitably coerced all employees • • • to become or remain members of the Union," *Saltsman Construction Co.*, 123 NLRB 1176, 1177 (1959), and "is sufficient in and of itself to establish the element of coercion in the payment of moneys by employees • • • whether or not proof of actual exaction of payments is established," *Nassau and Suffolk Contractors' Assn.*, 123 NLRB 1393, 1409 (1959).

This doctrine of per se coercion has been carried to its logical conclusion. In *United States Steel Corp. (American Bridge Division)*, 122 NLRB 1324 (1959),[16] the Board applied the *Brown-Olds* reimbursement remedy against a union despite the fact that the remedy was never sought by the General Counsel at any stage of the proceeding and despite the fact that the Trial Examiner's Intermediate Report was favorable to the union. On April 3, 1959 the union filed with the Board, in NLRB Cases Nos. 4-CA-1514 and 4-CB-373, a motion to reopen the proceedings "to receive evidence as to employees who voluntarily paid dues and initiation fees to Respondent Union during the period in question and were not in fact required to do so in order to secure or retain employment with Respondent Company." (Motion for Modification, etc., para. 14.) On May 4, 1959, by direction of the Board, the Board's Executive Secretary entered an order denying the union's motion, "on the ground that nothing has been presented that was not previously considered by the Board." (Order Denying Motions, p. 2.)

The final step in this perversion of logic was taken in *Lummus Corp.*, 125 NLRB No. 107 (1959). Faced with

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[16] Enforcement of the *Brown-Olds* portion of the order was denied in *NLRB* v. *United States Steel Corp. (American Bridge Division)*, 278 F. 2d 896 (3d Cir. 1960).

the threat of a *Brown-Olds* order, the union had made an offer of proof at the hearing before the Trial Examiner. The Intermediate Report described this offer as "primarily in the form of testimony of members of the Respondent [Union] and financial statements, to establish that * * * union members were not coerced by the unlawful contract but instead paid dues and other fees to the Local voluntarily * * * ." (Intermediate Report, August 10, 1959, NLRB Case No. 4-CB-384, mimeo. copy, p. 8.) Citing *Nassau and Suffolk* and *Saltsman* for the proposition that "an unlawful exclusive hiring contract *inevitably* coerces employees," the Trial Examiner rejected the proffered evidence. *Ibid.* (Emphasis in the original.) The Board affirmed.

The full dimensions of the *Brown-Olds* doctrine now stand revealed.[17] Upon the *a priori* proposition that workers would not join unions but for the existence of union-security arrangements, a proposition plainly at variance with history and recent empirical data, the Board has erected a per se doctrine of "inevitable coercion" of dues payments. And it has insulated this jerry-built structure from any contact with the disturbing world of reality by refusing even to consider evidence which would contradict factually the conclusions reached through its unreasonable inferences.[18]

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[17] We of course realize that the Court will only decide this case on the record before it. The process of decision should be enhanced, however, by viewing this particular situation in its proper setting of general Board policy. Furthermore, the NLRB itself undoubtedly regards the *Brown-Olds* remedy as a definitive formula of general application. Thus it seems appropriate that the Court should be aware of the proportions this doctrine has assumed.

[18] The Board has introduced inconsistency into its reasoning by allowing itself the luxury of contemplating at least a segment of reality in situations where such indulgence would not disturb its *a priori* rules for applying the *Brown-Olds* remedy. Thus, in *Anchorage Businessmen's Assn.*, 124 NLRB No. 72 (1959), the

No apology is made by the Board for this approach. In the brief for the NLRB filed in June, 1959 in *Teamsters Local 357* v. *NLRB*, No. 14,794 (D.C. Cir.), it is stated:

> "And, in any event, the propriety of the Board's reimbursement order manifestly is not defeated because some employees may have made these payments voluntarily. • • • For the Supreme Court has declared that where the 'inherent effect' of union or employer conduct is coercive, as here, not even the subjective evidence of employees to the contrary will avail the wrongdoer." (Brief for the NLRB, pp. 50-51.)

Board refrained from invoking the refund order where a union-security contract was invalid merely because of a technical violation of the filing requirements of section 9(f), (g), and (h) of the National Labor Relations Act. The Board said it would not require reimbursement for this reason, and for the additional reason that "all the pharmacists in the area had joined the Independent before the execution of the union security contract and therefore must be presumed to have paid the initial dues and fees voluntarily, rather than under the compulsion of such contract." 44 LRRM 1453, 1457.

Yet in *United States Steel Corp. (American Bridge Division)*, discussed *supra*, p. 12, the union sought in vain to reopen the proceedings with the averment, inter alia, "that many employees had paid dues in advance of their employment by Respondent Company in accordance with past practice extending over many years and for reasons other than to secure or retain employment with Respondent Company • • •." (Motion for Modification, etc., para. 12.)

And in *Saltsman Construction Co.*, 123 NLRB 1176-1177 (1959), the Board declared: "We do not agree [with the Trial Examiner] that the remedy of reimbursement should be limited to those employees who became members of the Union after beginning employment. • • • the illegal practice • • • inevitably coerced all employees • • • to become or remain members of the Union."

Perhaps not without significance as a key to the present Board's philosophy is the fact that, just two years before the Board initiated in *Brown-Olds* its doctrine of per se coercion of union dues payments, it repudiated a line of its own decisions which had held that employer interrogation of employees concerning their union affiliation or activities was per se unlawful. *Blue Flash Express, Inc.*, 109 NLRB 591, 593 (1954), expressly overruling *Standard-Coosa-Thatcher Co.*, 85 NLRB 1358 (1949).

Cited as a basis for this assertion are this Court's decisions in *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, and *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219. We feel that these decisions, fairly considered, refute rather than support the Board's contentions.

In *Donnelly Garment* the Board had been instructed by a Court of Appeals to admit and consider testimony by a company's employees that they had voluntarily organized and joined a union which the Board had charged was company-dominated. After a painstaking examination, this Court concluded that the Board had in fact obeyed the mandate of the Court of Appeals, even though the Board was left still convinced that the union was company-dominated. At no point did this Court suggest that "subjective evidence" was not a factor. Indeed it expressly noted that it was "not called upon to lay down a general rule of materiality regarding such testimony." 330 U.S. at 231. And of course *Donnelly* involved the admissibility of testimony regarding a union alleged to be company-dominated.

Radio Officers, we grant, upholds the power of the Board to draw "reasonable inferences from proven facts," without the necessity in every instance of having "subjective evidence of employee response." 347 U.S. at 49, 51. But in *Radio Officers* the *fact* of discrimination had been proved. The inference discussed and approved by this Court related to the effect of this proven discrimination on the employees, namely, whether "encouragement or discouragement [of union membership] can be reasonably inferred from the nature of the discrimination." *Id.* at 51. In the *Brown-Olds* situation it is the very fact of coercion which is at issue. And nowhere in *Radio Officers* is there any indication that the Board is authorized to draw an inference of coercion in splendid disregard of proven fact. Nowhere is there any indication that the Board may make

such an inference irrebuttable by refusing even to consider proffered testimony in contradiction of it. Especially pertinent on this point are the words of Mr. Justice Frankfurter, concurring in *Radio Officers* in an opinion in which he was joined by Mr. Justice Burton and Mr. Justice Minton:

> "But that should not obscure the fact that this inference may be bolstered or rebutted by other evidence which may be adduced, and which the Board *must* take into consideration. The Board's task is to weigh *everything* before it, including those inferences which, with its specialized experience, it believes can fairly be drawn." 347 U.S. at 56-57. (Emphasis supplied.)

The "reasonable inference" standard endorsed by the Court in *Radio Officers*, and supplemented by the view of the three concurring Justices that an inference is subject to rebuttal by other evidence, thus clearly stands athwart the headlong course of the Board's per se doctrine of mass coercion.

Per se doctrines of National Labor Relations Act violations are nothing novel. And neither is repudiation of them by this Court. In *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 409, the Court struck down the Board's attempt to brand an employer's bargaining for a management functions clause as "per se an unfair labor practice," where the evidence viewed as a whole did not show that the employer refused to bargain in good faith. The Court commented that "a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." 343 U.S. at 410. This healthy skepticism about substituting per se doctrines for a considered evaluation of the facts in each case seems even more appropriate in instances involving fancied coercion of dues payments by all the employees in a bargaining unit.

II. The Board's Brown-Olds Mass Reimbursement Order Is An Inappropriate Remedy, Not Adapted To Particular Circumstances, Oppressive In Its Operation, And Not Calculated To Effectuate The Policies Of The Act.

A. Oppressive and Capricious Operation of the Remedy

The Labor Board abuses its discretionary power in framing remedial orders unless they are "appropriate" and "adapted to the situation calling for redress." *NLRB* v. *District 50, United Mine Workers*, 355 U.S. 453, 458, 463; *NLRB v. Mackay Radio and Telegraph Co.*, 304 U.S. 333, 348. Accordingly, even assuming that the Board's underlying inferences supporting the *Brown-Olds* remedy were reasonable, it would still be necessary for the Board to justify the appropriateness of the remedy itself as a means of exercising its discretionary power under the National Labor Relations Act. Board orders cannot be applied "mechanically"; they must take "fair account . . . of every socially desirable factor in the final judgment." *Phelps-Dodge Corp.* v. *NLRB*, 313 U.S. 177, 198. With these fundamental principles set forth we will not burden the Court with a repetition of the legal arguments fully explored by the petitioners in their brief. We will confine our attention principally to data showing the oppressive and capricious operation of the *Brown-Olds* remedy.

As of August 1, 1959, nine months after the NLRB undertook full utilization of *Brown-Olds*, a mass reimbursement remedy had been applied in about thirty final orders issued by the Board.[19] At that time the files of the AFL-CIO con-

[19] This did not include any of the numerous Intermediate Reports in which Trial Examiners had recommended the imposition of the *Brown-Olds* remedy. Although the *Brown-Olds* case itself was decided in 1956, the remedy did not become one to be applied generally until November 1, 1958. This was the final deadline allowed unions and contractors by the Board's General Counsel to achieve conformity in their hiring arrangements with the standards

tained relatively detailed information regarding the estimated financial effect on eleven of the unions which had been subjected to this remedy. This supplied a sample of about one-third of the total. Since the intervening year has produced a continual round of vigorous and consistently successful attacks on *Brown-Olds* in the courts, with attendant variations from what would be the normal pattern of enforcement if the reimbursement remedy became accepted doctrine; no effort has been made to keep track of the effect of subsequent Board orders. The following is a tabulation of the estimated amounts involved in the eleven instances mentioned:

Brown-Olds Awards

Estimated Amount of Award	Size of Union Treasury Affected.
Unions with approximately 500 members or less	
$75,000	$80,000
$ 750	$34,000
$50,000	$ 3,000
Unions with approximately 500–1000 members	
$ 1,550	$100,000
$30,000–$50,000	$ 50,000
Unions with approximately 1000–1500 members	
$282,000	$155,000
$5	"Very small"
$300,000–$400,000	$113,000 (cash) $425,000 (total assets)
Unions with approximately 1500 members or more	
$15,000	$60,000
$ 7,000	$98,000 (cash) $245,000 (total assets)
$ 6,000	$96,000

The following is a tabulation of the relationship between the estimated amounts of these awards and the union treasuries affected:

Awards substantially greater than treasury	2
Awards approximately equal to treasury	3
Awards substantially smaller than treasury	5
Award of insignificant amount	1
	11

Of the eight unions affected which have less than 1500 members, five of them are threatened with awards which would wipe out their treasuries and which in two cases would place them many thousands of dollars in debt. Two of the three unions having memberships of 500 or less are so affected. The three large unions with memberships of 1500 or more are severely inconvenienced but in no instance is their treasury wiped out. The impact of the *Brown-Olds*

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enunciated by the Board in *Mountain Pacific Chapter, Associated General Contractors*, 119 NLRB 883 (1958). See letter of the NLRB's General Counsel, dated August 19, 1958 (5 CCH Lab. Law Rep. ¶50,103).

[20] In all of these cases there were either Motions for Reconsideration pending before the National Labor Relations Board or Petitions for Enforcement or Review pending in the courts. Consequently, the amounts of money which would be involved if the mass reimbursement orders should be enforced could only be estimated. The estimates were the best calculations possible on the part of union attorneys and officials on the basis of the formulas supplied by the Board or by its regional offices in compliance conferences.

The Board introduced the possibility of a vast multiplication of these sums in the future with its announcement of the following formula in *Nassau & Suffolk Contractors' Assn.*; 123 NLRB 1393, 1409 (1959): "In cases involving multi-employer contracts in which the contracting union and one or more employers are named respondent parties to the contract, the union's liability for reimbursement of sums unlawfully exacted also shall extend to all employees covered under such contract . . ."

remedy, as might be anticipated, falls most heavily upon the smaller unions least able to sustain it.

In section 1, paragraph 3 of the National Labor Relations Act the Congress set forth as one of the findings upon which it grounded the policies and provisions of the Act:

> "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by * * * restoring equality of bargaining power between employers and employees."

Nothing could more effectively destroy the balance of bargaining power between employers and employees, expressly stated by Congress to be a fundamental purpose of the National Labor Relations Act, than the continued application of this pernicious Board doctrine which could easily strip of financial resources or drive deeply into debt nearly half the unions it affects. Seemingly forgotten has been the warning of this Court that the Board may not apply "a remedy it has worked out on the basis of its experience without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349.

The very range in the size of awards (from $5 to $300,000 or $400,000) in these cases suggests one of the capricious aspects of the mechanical application of this massive refund remedy. Numerous factors having no intrinsic relationship to the supposed evil of the union-security provision or hiring practice sought to be eradicated will be decisive on the amount of the resulting *Brown-Olds* award. The same union-security provision or hiring arrangement will ordinarily be used by a union on a number of jobs in a particular locality. Yet the amount to be rein-

bursed in a given case will be determined by the duration of the particular job concerning which a complaint is issued, by the number of men working on that job, and by the length of time required to process the case through the Board and the courts.

Characteristic of the mechanical operation of the *Brown-Olds* remedy is the Board's failure to take any account of the legality of union-shop provisions under the proviso to section 8(a)(3) of the National Labor Relations Act. Under this proviso, in all states not having "right-to-work" laws, a legitimate collective bargaining representative can enter into an agreement with an employer requiring union membership as a condition of employment after the thirtieth day following the beginning of employment. Accordingly, even assuming arguendo that an employee is coerced into joining a union by a closed-shop provision or discriminatory hiring practice, the union "[a]t most * * * may have collected only 1 month's dues in excess of those to which it was equitably entitled"[21] under a valid union-security provision. So far as the men on the job are concerned—and these are the only ones covered by the refund order—this is realistically the sole injurious effect of a closed-shop arrangement. The Board utterly refuses to face up to this fact. It imposes the *Brown-Olds* remedy so as to require the reimbursement of all dues collected from the beginning of employment (insofar as the six-month limitations period allows) until the end of the job.

A further capricious effect of this doctrine has been described by a Board Trial Examiner even while utilizing it:

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[21] Board Member Peterson, dissenting in *Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594, 607 (1956). If no union shop or no union at all is what the employees want, a deauthorization or decertification petition is always available. See note 6 and related text, *supra*, p. 6.

> "*Brown-Olds* is a meat-axe remedy applied in meat-axe fashion. • • • inequities are inherent in applying *Brown-Olds*. One of these is that it is left to the charging party to determine whether all or only one or more of equally guilty contracting parties will be held liable for reimbursement." [22]

The nature of this particular problem is strikingly illuminated by a trio of charges involving the International Typographical Union. In *News Syndicate Co., Inc.*, 122 NLRB 818 (1959),[23] discrimination was alleged by two employees, one at the New York Daily News and the other at the Wall Street Journal. The first employee charged both the employer and the union while the second employee charged only the union. In *Honolulu Star-Bulletin, Ltd.*, 123 NLRB 395 (1959),[24] the employees alleging discrimination chose to charge the employer and not the union. In each instance, of course, the Board imposed the *Brown-Olds* remedy only against the party which was charged. With financial disaster for a union or even a marginal employer thus hinging on the caprice of the individual charging party, there is all the more reason to question whether a remedy of this nature can be said in any genuine sense to effectuate the policies of the Act.

[22] *Ingalls Steel Construction Co.*, NLRB Case No. 15-CA-1174 (1959) (Intermediate Report, mimeo. copy, p. 10).

The AFL-CIO believes neither employees nor unions should be subjected to these unrealistic and oppressive refund orders. However, the Board has taken the pains to suggest in its brief in *NLRB* v. *News Syndicate Co., Inc.*, No. 25,496 (2d Cir.), that an employer on whom the remedy is imposed could have a claim over against the union. (Brief for the NLRB, p. 35, n. 27.)

[23] Enforcement denied in *NLRB* v. *News Syndicate Co., Inc.*, 279 F.2d 323 (2d Cir. 1960).

[24] Enforcement denied in *Honolulu Star Bulletin* v. *NLRB*, 274 F.2d 567 (D.C. Cir. 1959).

B. PUNITIVE USE OF THE REMEDY

As we have already indicated, the Board's *Brown-Olds* remedy is based upon an unreasonable inference unsupported by and contrary to proven fact, and rendered irrebuttable by the Board's rejection of any offer of contradictory evidence. We have also demonstrated the oppressive and capricious effect of this remedy in actual operation. Why then has the Board increasingly resorted to its use?

We do not think that the Board can or will deny that the primary purpose of the *Brown-Olds* remedy is to enforce the Board's strictures on union-security and hiring hall arrangements. Specifically, its principal role is to enforce adherence to the three guarantees which, in *Mountain Pacific Chapter, Associated General Contractors,* 119 NLRB 883 (1958),[25] the Board declared would have to be explicitly included to make valid any agreements establishing exclusive referral systems.

[25] Enforcement denied in *NLRB* v. *Mountain Pacific Chapter, Associated General Contractors,* 270 F.2d 425 (9th Cir. 1959). The court declared it "patent that a contract which is fair on its face is not unlawful in and of itself simply because it does not contain clauses prohibitory of illegal action." *Id.* at 431. While upholding the Board's capacity "to say that it will give peculiar weight to certain evidence," the court refused to let the Board hold as a matter of law that a hiring hall contract "which omitted certain prohibitory stipulations was per se invalid and contrary to law." *Id.* at 432. The Court of Appeals in effect struck down the Board's attempt in *Mountain Pacific* to operate on the same basis on which it is trying to operate in the *Brown-Olds* situations, viz., on the basis of per se doctrines rather than reasonable inferences of fact. *Id.* at 429-432. This Court itself has noted that "the Board has no general commission to police collective bargaining agreements • • •." *Carpenters Local 1976* v. *NLRB,* 357 U.S. 93, 108.

The Board has indicated that it will apply the *Brown-Olds* reimbursement remedy if a contract fails to meet the *Mountain Pacific* standards even though the contract is otherwise valid on its face and even though there has been no showing that the contract has

On February 7, 1958 the General Counsel of the Board frankly advised unions and contractors in a letter:

> "The purpose of the Board in applying the so-called *Brown-Olds* reimbursement remedy is to effectuate the policies of the Act by, among other things, prevailing upon employers and unions to correct their illegal hiring arrangements." (5 CCH Lab. Law Rep. ¶ 50,060.)

In an address at the Southeast Trade Exposition on March 21, 1959, the General Counsel expressly linked the *Mountain Pacific* doctrine to the *Brown-Olds* remedy, commenting:

> "The subsequent history of the *Mountain Pacific* decision has been, in large part, a concerted program by this Agency to encourage appropriate affirmative action by the contracting parties to conform their col-

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been discriminatorily enforced against any particular employees. *Los Angeles-Seattle Motor Express, Inc.*, 121 NLRB 1629 (1958), modified and enforced 275 F. 2d 646 (D.C. Cir. 1960); *News Syndicate Co., Inc.*, 122 NLRB 818 (1959), enforcement denied 279 F.2d 323 (2d Cir. 1960). Formerly, refund orders were entered by the Board only where specific individuals had been found to be coerced into paying dues and fees. See, e.g., *Teamsters Local 404*, 100 NLRB 801 (1952), enforced 205 F.2d 99 (1st Cir. 1953). In *Nassau and Suffolk Contractors' Assn.*, 123 NLRB 1393, 1409 (1959), the Board expressly overruled two of its prior decisions in holding that the reimbursement remedy "is applicable to all closed-shop and exclusive hiring-hall agreements, which do not provide the safeguards set forth in the *Mountain Pacific* decision (119 NLRB 883, 893) whether or not proof of actual exaction of payments is established."

Of the system, in itself, by which a union serves as the instrumentality for referring workers to prospective employers for jobs, the Court of Appeals for the Ninth Circuit in its *Mountain Pacific* decision said simply: "The hiring hall is legal and has always been held so." 270 F.2d at 429, citing *NLRB* v. *Swinerton*, 202 F.2d 511 (9th Cir. 1953), *cert. den.* 346 U.S. 814; *Eichleay Corp.* v. *NLRB*, 206 F.2d 799 (3d Cir. 1953); *Del E. Webb Construction Co.* v. *NLRB*, 196 F. 2d 841 (8th Cir. 1952); *Hunkin-Conkey Construction Co.*, 95 NLRB 433 (1951).

lective agreements and hiring practices to the requirements of *Mountain Pacific*. In this respect, the major spur has been the so-called *Brown-Olds* remedy. * * * *deterrence is the underlying consideration* * * *."* (Mimeo. copy, pp. 5, 8; emphasis supplied.)

At the Rutgers University Conference on September 30, 1958 the General Counsel picturesquely emphasized the punitive nature of the *Brown-Olds* remedy and the coercive use made of it by the Board:

> "* * * this extraordinary remedy * * * demonstrates vividly the capabilities of administrative pressure and persuasion. * * * over the heads of the parties hung this statutory sword of Damocles—the constant awareness that *Brown-Olds* would be applied in full. * * * President 'Teddy' Roosevelt * * * carried a 'big stick' and with it he went far. We spoke softly and carried a 'big sword,' and the results to date have been heartening." (Mimeo. copy, pp. 6-8.)

In *Lummus Corp.*, 125 NLRB No. 107 (1959), the Board itself was outspoken in commenting on its use of *Brown-Olds*:

> "The reimbursement remedy more properly effectuates the purposes of the Act because it provides not only a *deterrent* to future violations but an *incentive* to future compliance." 45 LRRM 1223, 1224. (Emphasis supplied.)

Sharply contrasting with the decisions of the Board and the words of its General Counsel is the unqualified statement of this Court that the Board's "power to command affirmative action is remedial, not punitive." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 236; *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 12. In *Republic Steel*, as if anticipating the arguments advanced on behalf of the Board's policy of "deterrence" during the past three years, the Court supplied a blunt refutation:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 68

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; INDIANAPOLIS AND CENTRAL INDIANA DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 273 F. 2d 699 (R. 114-119). The decision and order of the National Labor Relations Board are reported at 122 NLRB No. 51 (R. 3-15).

JURISDICTION

The judgment of the Court of appeals was entered on January 22, 1960 (R. 120). The petition for a writ of certiorari was granted on June 27, 1960 (R. 122), 363 U.S. 837. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, based solely upon a finding that employment at a construction job was by agreement limited exclusively to union members referred by a particular local union or district council, the National Labor Relations Board may require that the unions refund to the employees "dues, nonmembership dues, assessments, and work permit fees" received by the unions from the employees.

STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), provides in pertinent part that:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . .

> "* * * it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." 311 U.S. at 12.

In striking down *Brown-Olds*, the Courts of Appeals have recognized the relevance of these words by this Court. Citing the quoted language from *Republic Steel*, the Third Circuit declared that "to order a union to reimburse dues which it would have collected even if it had not committed an unfair labor practice appears to be nothing more than a fine * * *. But a fine is clearly the imposition of a penalty and the Labor Board is not authorized to impose penalties." *NLRB* v. *United States Steel Corp. (American Bridge Division)*, 278 F. 2d 896, 900 (3d Cir. 1960). The Fifth Circuit remarked: "As a punitive measure the refund provisions of the Order should not be enforced." *NLRB* v. *Sheet Metal Workers Local 85*, 274 F. 2d 344, 347 (5th Cir. 1960). And the Ninth Circuit put it simply when it said that "reimbursing a lot of old-time union men could not be 'anything but a windfall to the employees and an unjust penalty * * *.'" *Morrison-Knudsen Co.* v. *NLRB*, 276 F. 2d 63, 76 (9th Cir. 1960).[28]

In a word, the *Brown-Olds* remedy, both in its underlying assumptions and in its actual application, is opposed to reason, to history, to empirical data, to Congressional policy, and to the pronouncements of this Court.

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[28] See also Simpson, "The Brown-Olds Dues Reimbursement Remedy," 45 *Va. L. Rev.* 1192, 1210 (1959), where it is concluded that *Brown-Olds* should be denied enforcement in cases in which dues payments are not coerced, since "in those cases the Board's order is not necessary to negate the effects of an unfair labor practice. It is a penalty imposed by the Board with the purpose of deterring the future execution of illegal union security agreements."

STATEMENT

Mechanical Handling Systems, Incorporated, manufactures, designs, and installs conveyors and allied equipment (R. 15). It has an agreement with petitioner United Brotherhood "to work the hours, pay the wages and abide by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America of the locality in which any work of our company is being done, and employ members of the United Brotherhood of Carpenters and Joiners" (R. 16).

On January 4, 1957, Mechanical Handling began a job at the plant of the Ford Motor Company in Indianapolis (R. 17). Two or three days later a business representative of petitioner District Council visited the job (R. 17). The business representative and the employer's superintendent agreed to hire millwrights and carpenters upon referral from petitioner Local 60 (R. 17-18).[1] In practice employment at the Ford job was secured solely through referral or clearance from Local 60 or the District Council (R. 18, 20, 24).

Two applicants for employment at the Ford job were members of another local union, located at Louisville, Kentucky, affiliated with United Brotherhood (R. 65, 66, 76). One of the two had been a member of some local union of United Brotherhood for fifteen years (Tr. 129-130).[2] Both had formerly worked for

[1] Section 8(f) of the National Labor Relations Act, enacted in 1959, validates in the building and construction industry entry into a prehire agreement, *i.e.*, an agreement between an employer and a union entered into before the actual employment of the workers covered by the agreement (*infra*, pp. 19-21).

[2] The original transcript of record is before this Court and "Tr." refers to that part of it which has not been included in the printed record.

CONCLUSION

For the foregoing reasons and for the reasons stated in the brief for petitioners, the judgment of the Court of Appeals should be reversed with directions to set aside the order of the National Labor Relations Board.

Respectfully submitted,

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